SUBJECT INDEX

Page

Preliminary statement 1

I.

The case is not moot 2

II.

The question raised is substantial 8

Conclusion 15

Appendix. State statutes cited ..... App. p. 1

TABLE OF AUTHORITIES CITED

Cases	Page
Appalachian Coals v. United States, 288 U. S. 344 ..	14
Baez, Ex parte, 177 U. S. 378	5
Berg v. Investors etc. Loan Co., 207 Cal. App. 2d 808, 24 Cal. Rptr. 701	5
Beveridge v. Lewis, 137 Cal. 619, 70 Pac. 1083	12
Booker v. Aitken, 140 Cal. 471, 74 Pac. 11	4
Brooks v. Oakland, 160 Cal. 423, 117 Pac. 433	12
Brown v. Western Railway, 338 U. S. 294	9
Browning v. Hooper, 269 U. S. 396	13
Buxbom v. Smith, 23 Cal. 2d 535, 145 P. 2d 305	4
Chesebro v. Los Angeles County Flood Control District, 306 U. S. 462	13
Cooper v. Aaron, 358 U. S. 1	10
Costello v. Immigration Service, 375 U. S. ...., 84 S. Ct. 580, 24 C. C. H. Sup. Ct. Bull. 653	14
County of Los Angeles v. Marblehead Land Co., 95 Cal. App. 602, 273 Pac. 131	12
Davis v. Wechsler, 263 U. S. 22	9
Edward v. South Carolina, 372 U. S. 229	9
Embree v. Kansas Road Dist., 240 U. S. 242	14
Empire Star Mines Co. v. Butler, 62 Cal. App. 2d 466, 145 P. 2d 49	6
Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112	10, 11, 14
Federal Construction Co. v. Ensign, 59 Cal. App. 200, 210 Pac. 536	12
First Nat. Bank v. Anderson, 269 U. S. 341	9
Hecht Company v. Bowles, 321 U. S. 321	2

Page

Henshaw v Foster, 176 Cal. 507, 169 Pac. 82 ....11, 14

Herzog v. United States, 99 L. Ed. 1299 9

J. I. Case Co. v. N.L.R.B., 321 U. S. 332 3

Local 74 v. N.L.R.B., 341 U. S. 707 3

Madera Irrigation Dist., In re, 92 Cal. 296, 28 Pac. 272 .....10, 11, 14

Miller v. Superior Court, 59 Cal. App. 334, 210 Pac. 832 5

Morrison v. Smith Bros. Inc., 211 Cal. 36, 293 Pac. 53 11

N.A.A.C.P. v. Button, 371 U. S. 415 8

Neblett v. Carpenter, 305 U. S. 297 15

Newcomb v. Newport Beach, 7 Cal. 2d 393, 60 P. 2d 825 6

New York Times v. Sullivan (Mar. 9, 1964), ... U.S. ...., 24 C.C.H. Sup. Ct. Bull. 845 8

Ohio v. Akron Park District, 281 U. S. 74 15

Orosi Pub. Util. Dist., In re, 196 Cal. 43 11

People v. Hawley, 207 Cal. 395, 279 Pac. 136 6

People v. Ontario, 148 Cal. 625, 84 Pac. 205 11

People v. Reclamation District No. 551, 117 Cal. 114, 48 Pac. 1016 12

Perma-Maid Co. v. Fed. Trade Com., 121 F. 2d 282 3

Podesta v. Linden Irr. Dist., 141 Cal. App. 2d 38, 296 P. 2d 401 12

Porter v. Lee, 328 U. S. 246 2

Porter v. Merhar, 160 F. 2d 397 2

Rogers Dev. Co. v. So. Cal. etc. Inv. Co., 159 Cal. 735, 115 Pac. 934 4

Page

St. Pierre v. United States, 319 U. S. 41 5

Singleton v. Perry, 45 Cal. 2d 489, 289 P. 2d 794 4

Sola Elec. Co. v. Jefferson Elec. Co., 317 U. S. 173 .. 9

Union Pac. R.R. Co. v. Pub. Service Comm., 248 U. S. 67 9

United Real Estate etc. Co. v. Barnes, 157 Cal. 515, 108 Pac. 306 5

United States v. Aluminum Co. of America, 148 F. 2d 416 3

United States v. Ward Baking Co., ... U. S. ...., 24 C. C. H. Sup. Ct. Bull. 815 4

Ward v. Love County, 253 U. S. 17 9

Walling v. Helmerich & Payne, Inc., 323 U. S. 37 2, 3

Walling v. Reuter, Inc., 321 U. S. 671 2

Miscellaneous

N.Y. Times, Mar. 10, 1964, p. 22, col. 7 8

Rules

Rules of the Supreme Court, Rule 16(c) 1

Statutes

California Code of Civil Procedure, Sec. 389 4

California Code of Civil Procedure, Sec. 473 4

California Code of Civil Procedure, Sec. 580 4

California Statutes of 1915, Chap. 755, Sec. 2, p. 1502 13

California Statutes of 1915, Chap. 755, Sec. 6, p. 1505 13

California Statutes of 1915, Chap. 755, Sec. 10, p. 1507 13

Page

California Water Code (1963), Sec. 71610 12
California Water Code (1963), Sec. 71860 13
California Water Code (1963), Sec. 72090 13
California Water Code (1963), Sec. 72095 4
California Water Code (1963), Sec. 72097 4

Textbooks

2 Witkin, California Procedure, p. 1216 5
2 Witkin, California Procedure, p. 1605 4

IN THE

Supreme Court of the United States

October Term, 1963
No. 811

JOHN C. YRIBARNE,

Appellant,

vs.

COUNTY OF SAN BERNARDINO, BOARD OF SUPERVISORS OF SAN BERNARDINO COUNTY, S. WESLEY BREAK, PAUL J. YOUNG, RICHARD G. MANLEY, NANCY E. SMITH, ROSS DANA, BUD FULLER, KARL AGAJANIAN, FRED SCHNABEL, JOHN SPENCER, CHESTER JANTZEN, and D. L. MILES,

Appellees.

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

Preliminary Statement.

But two points are made by appellees in support of their motion to dismiss or affirm.[1] They are, that the case is moot; and the federal question is not substantial. Each of these points was anticipated in our Statement As To Jurisdiction, pages 6-8, 11-15. We do not here repeat but merely supplement what was there said.

The motion was received by appellant on March 3, 1964.

[1] As this is an appeal from a judgment of a state, not a federal court, the provisions of Rule 16(c) relating to affirmance for want of substantiality are inapplicable.

ARGUMENT.

I.

The Case Is Not Moot.

The question whether to award an injunction against the holding of an election to form the Big Bear Municipal Water District, is indeed moot, since the election has been held. As appellees correctly point out, we have not hidden from the court our view that that is so. [See, *e.g., Statement As To Jurisdiction*, p. 6.] That injunction, however, was only one of several forms of relief that, on the facts made out below, could have been given appellant. The fact that the question of awarding this one form of relief is moot does not make moot the *case* in which that relief was sought and in which other appropriate and effective relief may still be awarded appellant. The judgment in the trial court was not merely that an injunction against the election be denied. It was that appellant "take nothing." [Clk. Tr. p. 196, lines 21-22.] The case is not moot because the question whether the district could be constitutionally formed with appellant's lands included in it without provision for a hearing on benefits, is still in controversy between the parties, has not been finally adjudicated and, if adjudicated in appellant's favor, will justify awarding to him, in this very action, appropriate relief in respect of the inclusion of his lands.

A case is not moot when the question in controversy is still open, and effective relief in respect of it can be given. [*Walling v. Helmerich & Payne, Inc.*, 323 U.S. 37, 42-43; *Hecht Company v. Bowles*, 321 U.S. 321, 327-328; *Porter v. Lee*, 328 U.S. 246, 251-252; *Walling v. Reuter, Inc.*, 321 U.S. 671, 674; *Porter v. Merhar*, 6 Cir., 160 F. 2d 397, 402; and see also the cases

cited, *Statement As To Jurisdiction*, pp. 7-8.] We have here ". . . 'an actual controversy, and adverse interests,' . . . with a 'subject-matter on which the judgment of the court can operate' . . ." [*Walling v. Helmerich & Payne, Inc., supra*, 323 U.S. at 43.] These are the elements of a live, not a moot case; and especially so when the burden against which relief is sought is a continuing or recurring one, as in the instant case is the future liability to taxation for the needs of the improvement district. [*Local 74 v. N.L.R.B.*, 341 U.S. 707, 715; *J. I. Case Co. v. N.L.R.B.*, 321 U.S. 332, 334; *United States v. Aluminum Co. of America*, 2 Cir., 148 F. 2d 416, 448; *Perma-Maid Co. v. Fed. Trade Com.*, 6 Cir., 121 F. 2d 282, 284.]

At the bottom of appellant's claim below was the contention that his lands could not be consitutionally included in the proposed district without some procedure by which he could be heard as to benefit or lack of it to his lands. [*Statement As To Jurisdiction*, pp. 5-6.] That claim makes up the federal question here sought to be reviewed, and for the review of which an appeal lies. [*Statement As To Jurisdiction*, pp. 1-2, 8-11.] Should the question be decided here in his favor, relief can be awarded him that will appropriately protect him against the burdens ensuing upon inclusion in the district and from which it was his ultimate purpose to protect himself. Stopping the election was but a means of achieving that purpose, not an end in and of itself.

That purpose can still be achieved in the instant action. The state court's power to award effective relief exists and the parties necessary to consummation of the purpose are before the court. For example, as effective a method of relief as stopping the election would have been is enjoining the collection of taxes on appel-

lant's land. Taxes for the district are levied by the County Board of Supervisors; all county officers charged with tax-collection duties have the same duties in respect of district taxes as they have for the county. [*Cal. Water Code*, (1963) secs. 72095, 72097.[2]] That means that collection is in the hands and control of the county. The county is a party to this action, as is its governing body, the Board of Supervisors. They may be enjoined from levying or collecting any district taxes on appellant's land.[3]

The fact that such relief was not specifically prayed for is beside the point. Appellant is entitled to have in this case *any* relief open on the facts proved. [*Buxbom v. Smith*, 23 Cal. 2d 535, 542-543, 145 P. 2d 305, 308; *Singleton v. Perry*, 45 Cal. 2d 489, 499, 289 P. 2d 794, 800 and cases there cited. *Booker v. Aitken*, 140 Cal. 471, 473, 74 Pac. 11; *Cal. Code of Civil Procedure*, sec. 580.] The right to such relief is not limited by the fact that there was only a prayer for an injunction against the election.[4] Indeed a prayer was

---

[2]All California statutes not printed in Appendix "B" to the Statement as to Jurisdiction are printed in the appendix to this brief.

[3]Even if additional parties or averments are necessary or desirable, California's liberal amendment policy would make it easy to bring them in. [*Cal. Code of Civil Procedure*, secs. 389, 473.] "The policy of great liberality in permitting amendments at any stage of the proceeding was declared at an early date and has been repeatedly restated." [Witkin, *California Procedure*, vol. 2, p. 1605, and cases there cited.]

[4]There was, however, a prayer for an injunction "as to any action or proceeding based upon said petition [to form the district], and for such other relief as the Court shall deem proper." [Clk. Tr., p. 4, lines 26-28.] A general prayer of that kind "is a sufficient foundation for any relief appropriate to the facts stated . . ." [*Rogers Dev. Co. v. So. Cal. etc. Inv. Co.*, 159 Cal. 735, 741, 115 Pac. 934, 936. See, *United States v. Ward Baking Co.*, ... U.S. ...., 24 C. C. H. Sup. Ct. Bull. 815, 821 (n. 3)]

not even necessary; and, when one was supplied, it did not become a part of the cause of action pleaded. [Witkin, *California Procedure*, vol. 2, p. 1216; *Berg v. Investors etc. Loan Co.*, 207 Cal. App. 2d 808, 815, 24 Cal. Rptr. 701, 705; *Miller v. Superior Court*, 59 Cal. App. 334, 338-339, 210 Pac. 832, 834.]

Appellees' presentation ignores entirely this rule of California practice. It ignores as well the significant distinction between the whole and one of its parts, between the case as an entirety and one of the questions in it. When regard is had to these matters it becomes evident that the essential controversy between the parties in the instant case is very much alive and that effective relief in respect of it may still be given. It is this fact that keeps the case from being moot, notwithstanding the mootness of one form of possible relief. A moot case, as this case is not, is one in which a reversal will do the appellant no good because, as the consequence of destruction of the subject matter, or of some other intervening cause, effective relief cannot be given him in the case. [*Ex parte Baez*, 177 U.S. 378, 390; *St. Pierre v. United States*, 319 U.S. 41, 42.] Effective relief can be given in the case at bar, as is shown above.

This is a California state court case. If it is not moot in the courts of that state, it should not be held moot here. In the California practice—and pretty much for the reasons above advanced—this case is not moot. Illustrative California decisions to that point are these:

> *United Real Estate etc. Co. v. Barnes*, 157 Cal. 515, 516, 108 Pac. 306—in an action to enjoin a sale of land for a delinquent assessment, the assessment being challenged on ground of fraud in adjusting the boundaries of the assessment dis-

trict, *held* the action was not rendered moot by payment of the assessment under protest to prevent the sale, because "the claim of the plaintiff to recover the money paid under protest involves the same questions that are involved in this appeal; and it [plaintiff] claims that in this action, if the judgment should be reversed, the superior court—as a court of equity—should order the defendant to refund the money paid under protest . . ."

People v. Hawley, 207 Cal. 395, 407, 279 Pac. 136, 141—an action to abate a nuisance on defendant's land, *held* not rendered moot by lapse of defendant's rights to the land in question, because the court was not "prepared to say that a reversal of the judgment would prove fruitless . . ."

Newcomb v. Newport Beach, 7 Cal. 2d 393, 402, 60 P. 2d 825, 829—an action to quiet title to tidelands was not rendered moot by dredging that caused the lands to be completely submerged, as title to the lands and the right of the defendant to make changes and improvements on the land were the issues involved in the action, and those issues were still alive.

Empire Star Mines Co. v. Butler, 62 Cal. App. 2d 466, 538-541, 145 P. 2d 49, 84-85—in an action to enjoin future trespasses upon a mine and to recover damages for an existing trespass, *held* that the action was not rendered moot by changed conditions intervening pendente lite, which made the mine inoperable and thus made an injunction no longer necessary. The court

> said: ". . . the ownership of the vein was relevant to the action for damages, as well as to the injunction, . . . Furthermore, apart from the cause of action for damages, the fact that the plaintiff does not immediately need injunctive relief in the form awarded by the decree, by reason of the closing of the mines, does not render moot the question of ownership of the disputed vein, to which both parties claim title . . . It is true that the ownership of that vein was incidental to the right to injunction . . . The trial court has decided the issue of ownership in plaintiff's favor. The trial was devoted largely to that issue . . . The adjudication of ownership in favor of plaintiff is not to be cast aside because facts arising pending appeal remove the immediate need for injunctive relief. Plaintiff is not to be deprived of that adjudication by reason of facts occurring after judgment because he brought his action in the form of a suit for injunction, rather than a quiet title suit."

Appellant is entitled to review, by this Court, of the constitutional question incorrectly decided below. That question is not moot because an election-injunction is no longer needed. An appropriate direction from this Court in respect of that question will open the way to other relief that is available in this action in the state court, and which will effectively accomplish the basic purpose for which the action was brought.

II.

The Question Raised Is Substantial.

1. The gist of appellees' contention that the federal question presented in the instant case is not substantial is simply that in California a water district of the sort here involved is called a "quasi-municipal corporation" and so, is not within the ambit of the rule upon which we rely. That rule is that land cannot be included in a special improvement district without there being accorded to its owner an opportunity to be heard on the question of benefit from the improvement. Of course, the reality of a given situation is not changed or dissipated by a name, and constitutional limitations cannot be avoided by the simple expedient of a christening. If the instant district is in fact one of the kind to which the indicated rule is applied, it is not taken out of it, nor is the violation of appellant's constitutional rights eliminated, by pinning an innocuous label on the taxing entity. A "state cannot foreclose the exercise of constitutional rights by mere labels . . ." [*N.A.A.C.P. v. Button*, 371 U.S. 415, 429; *New York Times v. Sullivan* (Mar. 9, 1964) ..... U.S. ....., 24 C.C.H. Sup. Ct. Bull. 845, 858, N.Y. Times, Mar. 10, 1964, p. 22, col. 7.]

The Big Bear Municipal Water District, as we shall show in a moment, will be seen, when viewed in the light of what it is and is not empowered to do, to be precisely the kind of a district to which this Court's decisions cited at pages 11-12 of the Statement As To Jurisdiction apply. That being so, the failure, indeed the refusal, of the state court to follow those decisions and the consequent denial to appellant of a constitutional right that this Court has clearly recognized and

vindicated, makes the question a substantial one. [See, *Herzog v. United States*, 99 L. Ed. 1299, 1301 (per Douglas, J., in chambers).]

Appellees' argument rests entirely on decisions of the state court. None from this Court is cited by them. On the other hand, a claim of denial of federal constitutional right is made by appellant. Whether that claim is good is a question for this Court to decide; and in arriving at that decision the Court will not be put off by any niceties of terminology in which the state court may have indulged, any more than it will by a state court's over-exacting insistence upon meticulous pleading. [See, *Brown v. Western Railway*, 338 U.S. 294, 299.] It will decide for itself, independently of the state court and by its own examination of the records, whether the federal right has *in fact* been infringed. [*Edward v. South Carolina*, 372 U.S. 229, 235, and cases there cited.] ". . . Whatever springes the state may set for those who are endeavoring to assert rights that the state confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice . . ." [*Davis v. Wechsler*, 263 U.S. 22, 24.] It is within this Court's "province to inquire not only whether the [federal] right was denied in express terms, but also whether it was denied in substance and effect . . ." [*Ward v. Love County*, 253 U.S. 17, 22. See also: *First Nat. Bank v. Anderson*, 269 U.S. 341, 346; *Union Pac. R.R. Co. v. Pub. Service Comm.*, 248 U.S. 67, 69-70; *Sola Elec. Co. v. Jefferson Elec. Co.*, 317 U.S. 173, 176-177.]

Actually, the argument advanced by appellees demonstrates the substantiality of the question. The decision below in this cause would seem *prima facie* to have

been rendered in the teeth of the precedents from this Court that we have cited. [*Statement As To Jurisdiction*, pp. 11-12.] To avoid the effect of those precedents it is necessary for appellees to argue that the district is one rather than another kind of entity: that it is not an assessment or special improvement district but a quasi-municipal corporation. It is not denied that if it is the former, provision for a hearing on benefits is constitutionally necessary. Determination whether the district is the kind of an entity appellees say it is, or of the kind to which the cited decisions apply, will require careful analysis of a long and complex statute—the California Municipal Water District Act [see, *Statement As To Jurisdiction*, p. 4, and Appendix "B" *passim*]—and critical examination and study of a considerable number of decisions, state and federal. To the proper execution of such a task, briefing, oral argument and a plenary hearing are needed. Thus, the question is shown to be substantial.

Even a cursory look at the California decisions put forward by appellees [*Motion to Dismiss Or Affirm*, pp. 11-13] will underscore the substantiality and importance of the question, by revealing the necessity for putting the law of this subject back on the right track in that state. [See, *Statement As To Jurisdiction*, pp. 14-15.] The error of the state courts originated by treating *Fallbrook Irr. Dist. v. Bradley*, 164 U.S. 112, in which the true rule was expounded, not as establishing the supreme law of the land [see *Cooper v. Aaron*, 358 U.S. 1, 18] but as merely another case that could not and need not be followed because the law had been settled otherwise in California by *In re Madera Irrigation Dist.*, 92 Cal. 296, 28 Pac. 272,

Madera was decided before *Fallbrook* and without benefit of this Court's views on the subject. Furthermore, it went off on the proposition that the statute adequately provided for a hearing. [See, 92 Cal. at 324, 28 Pac. at 278-279.]

Be that as it may, in the first California case to be decided after this Court's views had been expressed in *Fallbrook*, the state Supreme Court (although on a somewhat different point from ours), merely followed *Madera* slavishly without any discussion or apparent awareness of *Fallbrook*. [*People v. Ontario*, 148 Cal. 625, 84 Pac. 205.] When our point did arise after *Fallbrook* had been decided, the state Supreme Court again did no more than to follow *Madera*, saying that notwithstanding "any expression in the *Fallbrook Irrigation* case, we are committed to the reasoning of the *Madera District* case, which was followed in *People v. Ontario*, [*supra*, 148 Cal. 625, 84 Pac. 205] long after the decision in the other case had been made . . ." [*Henshaw v. Foster*, 176 Cal. 507, 514-515, 169 Pac. 82, 85.]

From that time on California has continued to follow *Henshaw* and *Madera*, giving no visible heed to the contrary decisions of this Court, other than to say, for example, that the *Fallbrook* rule does not apply to quasi-municipal corporations—which, of course, is merely another way of expressing continued adherence to *Henshaw* and *Madera* instead of to the constitutional doctrine of this Court. [See, *In re Orosi Pub. Util. Dist.*, 196 Cal. 43, 51-52. Also, *Morrison v. Smith Bros. Inc.*, 211 Cal. 30, 293 Pac. 53, in which neither *Fallbrook* nor any other decision to the point from this Court was mentioned or discussed.] The

court below in the case at bar persisted in this slavish adherence to the errant California rule.

2. Under the statute here drawn in question a California Municipal Water District is created and exists for one, and only one purpose. That purpose is to provide water for the beneficial use of such of the lands included within its boundaries as need or take the water. It has no governmental powers or functions other than the taxing power with which to pay for its water service. [*Cal. Water Code* (1963) sec. 71610; *Statement As To Jurisdiction*, Appendix "B," pp. 24-25.] It is not the kind of an entity that is designed for local self-government or that provides facilities or services or performs political functions that are of general benefit to the community as a whole, but which may or may not produce to some part of the included lands a special benefit different from that enjoyed by the mass. [See, *Podesta v. Linden Irr. Dist.*, 141 Cal. App. 2d 38, 54, 296 P. 2d 401, 411-412; *County of Los Angeles v. Marblehead Land Co.*, 95 Cal. App. 602, 614-615, 273 Pac. 131, 137; *People v. Reclamation District No. 551*, 117 Cal. 114, 121-123, 48 Pac. 1016, 1017, 1018.] The water district's benefits, if any, are peculiar and special to the lands using the water that the district provides. That is what makes it in fact an assessment or special improvement district, rather than a municipal corporation exercising political or governmental functions. [See, *Beveridge v. Lewis*, 137 Cal. 619, 623-624, 70 Pac. 1083, 1085-1086; *Federal Construction Co. v. Ensign*, 59 Cal. App. 200, 216-217, 210 Pac. 536, 540; *Brooks v. Oakland*, 160 Cal. 423, 426-429, 117 Pac. 433, 434-436.]

In this respect the district is indistinguishable from those involved in the cases upon which we rely, and in respect of which this Court held that due process required that owners of included lands be given an opportunity to be heard on the question of benefits unless, as is not true in the instant case, the boundaries of the district were fixed by the legislature. For example, in *Chesebro v. Los Angeles County Flood Control District*, 306 U.S. 462, the district was formed for the single purpose of controlling flood and storm waters in the district. [306 U.S. at 460.] It had the same kind of bonding assessment and taxing powers as our district has.* Like ours, it had no general governmental powers or functions. [Cf., *Cal. Stats. 1915*, c. 755, secs. 2, 6, 10, pp. 1502, 1505, 1507, with *Cal. Water* Code (1963) secs. 71860, 72090 *et seq.*, *Statement As To Jurisdiction*, Appendix "B, pp. 28-31.] The label "quasi-municipal corporation" cannot hide the reality that our district is no different from the flood-control district involved in *Chesebro*.

The road district involved in *Browning v. Hooper*, 269 U.S. 396, also was no different in essential characteristics from ours. It too was formed for one purpose, *i.e.*, to construct and maintain roads in the district. It too was authorized to issue bonds and levy taxes to pay for the district's activities. Its boundaries too were determined by those who petitioned for its formation. It too had no general governmental powers. Nonetheless, the statute under which it was formed was held unconstitutional because it did not provide owners of included lands a hearing on the question of benefits. Looking through names to substance or reality, our district is no different. "Realities must

dominate the judgment." [*Appalachian Coals v. United States*, 288 U.S. 344, 360. See also *Costello v. Immigration Service*, 375 U.S. ...., 84 S. Ct. 580, 587, 24 C. C. H. Sup. Ct. Bull. 653, 673.]

Similar comparisons can be made between our district and those with which the other cases cited by us were concerned. [*Statement As To Jurisdiction*, p. 12.] In such of them as upheld the constitutionality of the enabling legislation, the ground of decision was not that the district was a quasi-municipality but that the statute provided for the requisite hearing. It was made clear that had that not been so the statute would be unconstitutional. [See, *e.g.*, *Embree v. Kansas Road Dist.*, 240 U.S. 242, 247; *Fallbrook Irrigation District v. Bradley*, 164 U.S. 112, 166-167, 170-171.[5]

The reality of this case is that the facts relating to the purpose, formation, powers and benefits of our district are the same as those considered by this Court in the cases we have cited. It is those facts, not mere names, that must govern decision here.

3. We have urged that the question here is substantial because the decision below is directly counter to the well established rule in this Court that a statute is unconstitutional that delegates to private persons, without any legislative standards or governmental supervision, the power to control the property of another. [*State-*

[5]The progenitor of the California rule upon which appellees rely was *In re Madera Irrigation District*, *supra*, 92 Cal. at 323-324, 28 Pac. at 278-279. It dictated the result in *Henshaw v. Foster*, *supra*, 176 Cal. at 514-516, 169 Pac. at 85-86, upon which appellees lean so heavily. It is, therefore, interesting to note that in *Fallbrook* this Court was not unware of the existence of the doctrine exemplified by those cases, for *Madera* was cited in argument by both appellants and appellees. [164 U. S. at 124, 126.]

ment As To Jurisdiction, pp. 13-14.] Appellees' reply is nothing more than a play on words. [See, *Motion to Dismiss or Affirm*, p. 17.] In the two cases cited by appellees' the "delegation" involved was delegation of legislative power to one of the non-legislative departments of government—obviously quite a different matter from the kind of delegation we are talking about. Even so, in *Ohio v. Akron Park District*, 281 U.S. 74, 79, cited by appellees, the question was held not substantial because "repeated decisions" of this Court had settled the rule in favor of a delegation of the sort there involved, and *in accord* with the decision below. Our case is just the opposite. Here, the earlier decisions of this Court (we have cited three) have settled the rule *against* the view taken below. In *Neblett v. Carpenter*, 305 U.S. 297, 302, the other of appellees' citations, the holding was not that the question was not substantial but that it was not a federal question but only one of state law.

Conclusion.

The motion to dismiss or affirm should be denied; and probable jurisdiction noted.

Respectfully submitted.

HERMAN F. SELVIN,
JOHN B. SURR,
JAMES W. DILWORTH,
Attorneys for Appellant.

APPENDIX.

State Statutes Cited.

California Water Code (1963)

"§ 72095. The board shall direct that, at the time and in the manner required by law for the levying of taxes for county purposes the board of supervisors shall levy, in addition to any other tax it levies, a tax upon the property within the district, or improvement district therein benefited by the bonded debt, as the case may be, at the rate or rates fixed by the board. The officer or body having authority to levy taxes within each county shall levy the tax so required."

"§ 72097. All county officers charged with the duty of collecting taxes shall collect district taxes at the same time and in the same form and manner as county taxes are collected, and shall pay the collected district taxes to the district."

California Code of Civil Procedure

"§ 389. A person is an indispensable party to an action if his absence will prevent the court from rendering any effective judgment between the parties or would seriously prejudice any party before the court or if his interest would be inequitably affected or jeopardized by a judgment rendered between the parties.

"A person who is not an indispensable party but whose joinder would enable the court to determine additional causes of action arising out of the transaction or occurrence involved in the action is a conditionally necessary party.

"When it appears that an indispensable party has not been joined, the court shall order the party asserting

MICRO CARD
TRADE MARK ®
22
PC 1142
MATTHEW BENDER & COMPANY
MB
49-64
microcard